

The Democratic Public Domain: Reconnecting the Modern First Amendment and the Original Progress Clause (a.k.a. Copyright and Patent Clause)

by Malla Pollack¹

Introduction

Professor Balkin's call for a First Amendment jurisprudence fit for a digital age² silently reinvents the usually overlooked original meaning of U.S. Constitution, Article I, Section 8, Clause 8. This essay demonstrates how the Court's delay in interpreting the Constitution led to a serious misreading.

I invite you to enter the world of what should-have-been by simply *reading* the Constitution. Axiomatically, when reading statutes, one starts with the text and reads each section in context. The Constitution is not always treated as sensibly.³ This short essay demonstrates the interesting outcome of actually reading Article One, Section Eight, Clause Eight (a.k.a. the Progress Clause, a.k.a. the Copyright and Patent Clause) *in pari materia* with the First Amendment. If the Progress Clause had been construed when its original meaning was still obvious, United States law would be far different. In this area at least, the Drafters' Constitution was much less aristocratic than the modern (mis)reading. The original meaning of the Progress Clause, furthermore, should have stimulated a more communitarian First Amendment, the type of First Amendment currently being suggested by leading First Amendment scholars such as Jack Balkin.⁴

This article does not make the radical claim that the United States should jettison all departures from the public original meaning of the Progress Clause. However, we should question those departures and carefully consider any further out migration.

I. Reading the Original Text

The words in Article One, Section Eight, Clause Eight read: "Congress shall have the power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times

¹ Visiting Associate Professor of Law, University of Oregon School of Law. My thanks to Diane Zimmerman for sparking this piece by sharing a draft of her case intensive article *Is There a Right to Have Something to Say? One View of the Public Domain*, forthcoming [need to update] (draft on file with author). Special thanks as well to Edward C. Walterscheid for his learned criticism of earlier drafts. This piece merely sets out a general theory. Full discussion would raise hundreds of nuances involving more hundreds of insightful articles.

² See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, Yale Law School Public Law Working Paper No. 63, available at <http://papers.ssrn.com/abstract=470842> (visited Feb. 14, 2004), forthcoming New York Univ. L. Rev. (arguing that Internet changes focus of First Amendment from the right of a few privileged speakers, such as broadcasters, to address to the masses to the right of each person to participate in a "democratic culture.").

³ For example, consider Eleventh Amendment jurisprudence.

⁴ See, e.g., Balkin, *supra* note 2.

to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]⁵ Oddly, for over two hundred years no one performed any scholarly research on the 1789 American meaning of the word ‘progress.’ Early readers knew; later readers (mis)assumed.

As my historical research has demonstrated, the word “progress” in the 1789 United States meant geographical movement, spread, dissemination.⁶ If asked to quickly finish the phrase “the progress of the _____,” a 1789 American would have said “fire.” Fire spreads in all directions. A spreading fire is a bad thing, not an inherent part of social advancement. Similarly, 1789 Americans spoke of the ‘progress’ of devastating hoards of insects, the ‘progress’ of epidemic diseases, and trying to halt the ‘progress’ of invading troops. Asking how many of the 1789 residents of the United States believed in what 1850 Americans called “the Idea of Progress,” i.e. that the world was getting better, or that such betterment was a natural process (divine or scientific), is not the same as asking the meaning or usage of the word ‘progress’ in the United States of 1789.⁷

Even in the 1780s, the word ‘progress’ was used sometimes by some (usually highly educated) speakers to mean “qualitative improvement.” That meaning seemed to be slipping into elite usage from the French. That meaning, however, does not work in the Progress Clause. First, it renders part of the Clause redundant. As a legislative goal, “promoting the improvement of knowledge” is no different than “promoting knowledge.” More importantly, ‘science’ in the eighteenth century included the study of moral philosophy; no sane politician in 1787 America would have burdened a controversial referendum with the implication that mere humans could

⁵ U.S. Const. Art. I, sec. 8, cl. 8.

⁶ For a full discussion of the evidence and logic underlying this claim, see Malla Pollack, *What is Congress Supposed to Promote? Defining “Progress” in Article One, Section Eight, Clause Eight of the United States Constitution, or Introducing the Progress Clause*, 80 Neb. L. Rev. 754 (2001)(actually published fall 2002). *But see* Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science*, 36 Loyola L.A. 1, 45 (2002) (disagreeing). Solum claims that “[m]ost of [Pollack’s] evidence involves cases in which the term “progress” has a geographic or spatial meaning, but this usage is most frequently associated with linear movement (from point A to B) rather than spread in the sense of diffusion (from the center outwards). One might say that the beetle progressed from the center of the table to the edge, but it would be odd, although not inconceivable, to say that the spilled milk progressed to cover the whole table.” *Id.* at 45. Solum, is ignoring fire, insects, and diseases. I also disagree with his belief, *see id.*, that the subjective intent of the Drafters is more important than the perception of the ratifiers. My conclusion has also been public disagreed with by historian Edward E. Walterscheid who believes that “the language of the introductory phrase is derived from Madison's proposal ‘to encourage . . . the advancement of useful knowledge and discoveries.’” Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, at n.60 (2002). Along with Solum, Walterscheid gives great importance to both the Drafter’s discussion of the text during their secret composition sessions and to preserved statements by prominent politicians of 1789. I, on the contrary, prioritize the everyday meaning of the words to the general public. On this basic issue of constitutional interpretive strategy, I respectfully but firmly disagree. *See also* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loyola L. Rev. 611, 611-614 (admitting that Paul Best and H. Jefferson Powell’s critiques of *subjective* originalism are both “familiar and widely accepted”; suggesting an objective version of originalism based on the Constitution’s meaning to the ratifying generation.).

⁷ For support and fuller argument, *see* Pollack, *supra* note 4 [*Progress*].

improve on Jesus' moral teachings.⁸ In sum, the Progress Clause sets Congress the goal of promoting the distribution of knowledge and new technology among the populace.⁹

Diffusion, the Progress Clause's immediate goal, should lead to the quality improvement of human society and the human knowledge base – the now-assumed meaning of 'progress.' The original Progress Clause rests on the assumption that social betterment is triggered by wide dissemination of knowledge and technology. This spread-education theory of social improvement is a core doctrine of the early Enlightenment; the inevitability of social improvement depends on disseminating learning, skills, information, power, and property throughout the globe, and throughout the population of each nation state. Improvement in human knowledge and behavior is assured by natural processes if, and only if, learning is shared with all. Improvement is inevitable if one (1) fixes thought in writing¹⁰ (thus making it shareable at a distance in time and space), and then (2) teaches all homo sapiens to read (thus including all humankind in the quest for better understanding). Social improvement is the inevitable outcome of including all humans in the quest. Then, and only then, any group's stumbles have little power to halt the specie's forward journey.¹¹ The early Enlightenment "Idea of Progress" was not aristocratic. Faith in the future was not based on faith in a few super-achievers.¹²

Consider the contrasting, aristocratic slant of the English Statute of Anne, enacted for "the encouragement of learned men to compose and write useful books."¹³ Even if the general populace is illiterate, ill informed, and unheard on the issues of the day, learned men can continue to write useful books. Learning may improve with such a policy because the most informed persons in the society will push the frontiers of human knowledge. However, this aristocratic approach to social improvement is not what the original language of the Constitution supports.¹⁴

⁸ For support and fuller argument, see Pollack, *supra* note 4 [*Progress*].

⁹ In such a short essay, I will not reiterate the arguments against congressional power to bypass the Progress Clause's limits by invoking the Commerce or Necessary and Proper Clauses. See, e.g., Paul S. Heald & Suzana Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119 (discussing).

¹⁰ The 1976 Copyright Act is, therefore, quite proper to begin copyright at fixation. See 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works or authorship *fixed* in any tangible medium of expression") (emphasis added).

¹¹ See Condorcet, *Sketch for a Historical Picture of the Progress of the Human Mind* 33, 38, 42, 73-76, 92-93, 99-106, 117-20, 136-40, 164, 171, 186-88 (trans. June Barraclough, intro. Stuart Hampshire; n.d. Noonday Press, New York); Turgot, *On Universal History*, in *Turgot On Progress, Sociology and Economics* 61, 116-18 (trans. & ed. Ronald L. Meek, Cambridge Univ. Press 1973).

¹² Professor Balkin reaches the same point about free speech theory: "Freedom of speech is more than the freedom of elites and concentrated economic enterprises to funnel media products for passive reception by their audiences." See Balkin, *supra* note 3, at 58.

¹³ 8 Anne ch. 19 (1710).

¹⁴ Fear of such a society was presumably behind the public attacks on Richard J. Herrnstein & Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (Free Press pbk ed. 1995). *The Bell Curve* describes

Fleshing out the words in the Progress Clause, it allows Congress to give¹⁵ authors short-term exclusive rights in their writings (that is in the expressions with which non-protected ideas and facts are dressed) in order to promote the distribution of ideas and facts ('science,' currently called knowledge). 'Authors' is a very broad term, properly not limited to originators of literary works.¹⁶ Contrastingly, Congress may give inventors short-term rights over their discoveries (not just their explication of these discoveries). Technology protection, however, is limited to *improvements*. I agree with the Supreme Court's conclusion that the words "inventors" and "discoveries" requires patents be granted only when the alleged invention is a noticeable advancement over prior technology,¹⁷ "nonobvious to a person of ordinary skill" in the relevant "art."¹⁸ The Clause is a limit on Congress, thus demonstrating that the base right is in the public

the United States as controlled by an elite which is superior in all of education, intelligence, money, and power – a separately living elite which fears the under classes it rules. *See id.* at 509-25.

¹⁵ I accept the Court's choice of possible 1789 definitions for "secure." *See* *Wheaton v. Peters*, 33 U.S. (8 Peters) 591, 661-62 (1834) (choosing to read "secure" to give Congress the power to create exclusive rights for authors, as opposed to making existing rights safer). As the Court points out, while some eighteenth century lawyers had argued for common law rights for authors, no one seemingly believed inventors had been protected by similar common law rights. Johnson's definitions of the verb "to secure," do not focus on whether the *res* secured preexists the security. *See* II Samuel Johnson, *A Dictionary of the English Language 1732* (1978 Librarie du Liban facsimile reprint of 1773 ed.). Johnson's first definition of "to secure," includes "to make certain, to put out of hazard, to ascertain." *Id.* Johnson illustrates this meaning, *inter alia*, with the following quotation from Locke:

Actions have their preference, not according to the transient pleasure or pain that accompaies or follows them here, but as they serve to *secure* that perfect durable happiness hereafter.

Id. I cannot make sense of this Lockian explanation on the theory that "secure" may only refer to making safe preexisting *res*.

¹⁶ For example, God was termed the author of the world and Satan the author of both sin and death. *See* John Milton, *Paradise Lost*, in *The Poetical Works of John Milton* 1, 173, 219, 222 (Oxford Univ. Press ed., 1961). "Author," like most words, had multiple dictionary definitions in the late eighteenth century. Johnson lists four:

1. "The first beginner or mover of any thing; he to whom any thing owes its original."
2. "The efficient; he that effects or produces any thing."
3. "The first writer of any thing; distinct from the *translator* or *compiler*."
4. "A writer in general."

I Johnson, *supra* note 15, at 133 (emphasis in original). Walterscheid prefers the last two of these definitions as more in keeping with Madison's and Pinkney's respective suggestions to the constitutional drafting convention for some type of protection to "literary authors" or "authors." *See* Edward C. Walterscheid, *Divergent Evolution of the Patent Power and the Copyright Power*, forthcoming IDEA at 36 (draft on file with author). Walterscheid also relies on Johnson's definitions of "writing." *See id.*

To my knowledge, no one has performed empirical research on the actual use of the words "authors" and "writings" in the 1789 United States. Since the wide meaning follows one available 1789 definition, comports with current legal practice, and seems to fulfill the general purpose of the Clause, I forebear currently from challenging the Court's choice of meanings for this word at this time.

¹⁷ "Useful arts" means technology, and excludes both commerce and the learned professions. *See, e.g.,* John R. Thomas, *The Patenting of the Liberal Professions*, 40 B.C. L. Rev. 1139, 1169-75 (1999) (discussing); Malla Pollack, *The Multiple Unconstitutionality of Business Method Patents*, 28 Rutgers Comp. & Tech. L.J. 61, 86-91 (2002) (same).

¹⁸ *See* *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (holding that this wording in the 1952 Patent Act represents a constitutionally required standard). *But see* Edward C. Walterscheid, "*Within the Limits of the Constitutional*

(not in the government, the inventors, or the writers). The Clause bars some government actions by negative implication,¹⁹ but does not go so far as to prevent use of the spending power to reward authors or inventors.²⁰

Recognizing the original meaning of the Progress Clause explains why the Drafters did not acknowledge any tension between the Progress Clause and the First Amendment. Since copyright statutes would be enacted only to encourage the dissemination of knowledge, copyright was not allied with censorship. Quite the opposite, the Progress Clause should be viewed as the pre-First Amendment First Amendment. The dissemination reading of the Progress Clause, therefore, makes sense of James Madison's championship of a Constitution without a bill of rights even though "[a] popular government without popular information [] or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both."²¹

The Drafters were not being obtuse or hypocritical, they merely defined the word 'progress' differently than we do. Nor did they have any need to discuss the then-obvious meaning of a common word during the ratification debates. No wonder the Progress Clause did not raise Anti-Federalist hackles. No wonder the Progress Clause was barely mentioned in the ratification brouhaha.²² Since Congress was empowered only to enact copyright statutes which disseminated knowledge, the Copyright power had no potential to support censorship.²³ The

Grant": *Constitutional Limitations on the Patent Power*, 9 J. Intel. Prop. L. 291, 318-28 (2002) (arguing against constitutional basis for this requirement). As with "author," I am not claiming that I have performed empirical research on the 1789 common meaning of "inventors" or "discoveries." I have not yet done so and know of no one who has. Since the Court's choice of definitions is within those possible and seems to mesh well with the policy behind the Clause, I choose not to challenge these definitions at this time.

¹⁹ See Malla Pollack, *Unconstitutional Incontestability*, 18 Seattle Univ. L. Rev. 259, 270-326 (1995) (discussing negative implication at length).

²⁰ See Walterscheid, *supra* note 6 [*Anatomy*] (agreeing that Congress may use Spending Power to promote science and art). Some comments in the first session of Congress, however, raise doubt that Congress may encourage science by any action other than providing the inventor with limited rights to exclude. See Remarks of Rep. Tucker during discussion of possible funding for exploration of Baffin's Bay, in 10 Documentary History of the First Federal Congress of the United States at 211-20 (Linda De Pauw et al. Eds. 1977).

²¹ Letter from James Madison to W.T. Berry (Aug. 4, 1822), in James Madison, *The Complete Madison* 337 (Saul K. Padover ed., 1953).

²² See Malla Pollack, *Purveyance and Power or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 Southwestern Univ. L. Rev. 1, 99-116 (2000) (published Oct. 2001) (discussing ratification).

²³ The early United States copyright statute was for a very short period, covered very few types of works, and gave copyright holders very limited exclusive rights. See Copyright Act of 1790, 1 Stat. 124. In censorship potential, it was nothing like the current content of Title 17 of the United States Code. Similarly, since Congress could only grant patents that disseminated improved technology, the Progress Clause was not a replay of English law before the Statute of Monopolies. See generally, Malla Pollack, *Purveyance and Power or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 Southwestern Univ. L. Rev. 1 (2000) (published Oct. 2001) (providing detailed historical account of relationship between Statute of Monopolies and the Progress Clause).

distributive function of the Progress Clause meshes with the democratic discussion theory of the First Amendment. In this sense, copyright is correctly viewed as an engine of free expression.²⁴ However, recognizing the full force of distribution includes recognizing that free expression is not only for leaders. All persons partake in distribution and, hopefully, share in the self-realization aspects of speech.²⁵

The original congruence between the First Amendment and the Progress Clause is not visible in the case law because the First Amendment (and the Progress Clause) remained judicially unconstrued as the every day meaning of words changed, especially the word ‘progress.’ The so-called ‘Idea of Progress’ (axiomatically invoked in the nineteenth century United States to legitimize destroying the natural environment, over working wage employees, invading neighboring states, giving public land to railroad companies owned by robber barons, and decimating the native population) is a completely different concept than the belief in natural improvement through universal education. The later “Idea of Progress” evokes the triumph of the most economically astute, social Darwinism, the rule of a small band of natural aristocrats. Turgot and Condorcet would not have recognized this perverse mutation of their theory of social improvement through universal education and universal empowerment.

The dissemination reading of the Progress Clause centralizes the now-beleaguered public domain.²⁶ The default position (absent optional statutes)²⁷ is that all humans have the right to use written or publicly practiced knowledge.²⁸ They are common owners in a shared resource pool, a resource pool which grows best when shared,²⁹ a network.³⁰ They (not Congress) own the public domain in the Lockian sense that each person has the right not to be excluded.³¹ The

²⁴ See *Eldred v. Ascroft*, 537 U.S. 186, 219 (2003) (quoting *Harper & Row Publ. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (describing copyright as an engine of free expression)).

²⁵ See Balkin, *supra* note 2, at 11-15 (explaining how Internet empowers more people to fashion culture by routing around or glomming on mass media).

²⁶ For a fuller explication, see Malla Pollack, *The Owned Public Domain: The Constitutional Right Not to Be Excluded— or the Supreme Court Chose the Right Breakfast Cereal in Kellogg v. National Biscuit Co.*, 22 *Hastings Comm/Ent L.J.* 265 (2000). As per David Lange, “I am interested in the public domain as an affirmative source of entitlements capable of deployment, as when and where required, against the encroachments upon the creative imagination threatened by intellectual property.” David Lange, *Reimagining the Public Domain*, 66 (1&2) *L. & Contemp. Probs.* 463, 476 (2003).

²⁷ The Progress Clause gives Congress the power to pass statutes. It does not require their enactment.

²⁸ A thinker or inventor could prevent sharing by preserving secrecy.

²⁹ Do not let the drift between ‘property’ and ‘rights’ confuse; the rights/property dichotomy was created *after* the Drafters’ era. See John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 *U. Chic. L. Rev.* 49 (1996).

³⁰ See, e.g., Mark Lemley, *The Legal Implications of Network Effects*, 86 *Cal. L. Rev.* 479 (1998) (explaining how networks become more valuable to each member as membership increases).

³¹ See John Locke, *Two Treatises of Government*, Treatise One § 193 (defining property as something “that without a Man’s own consent it cannot be taken from him.”). As Balkin recognizes, Internet glomming on is “*nonexclusive* appropriation.” Balkin, *supra* note 2, at 12 (emphasis in original).

author or inventor has earned some return both for his work and for his sharing, but an author or inventor has no right to hoard his or her improvement if granted a reasonable remuneration.³² Congress may temporarily bar the public from using some writing or invention, but only if the temporary exclusion promotes dissemination. Since the public, not Congress, owns the public domain, retrospective extension of copyright holders' power to exclude the public is an illegitimate attack on the public's rights.³³

The dissemination reading of the Progress Clause renders central "limited times," fair use, and the idea/expression dichotomy. These doctrines are neither the grudging crumbs supported by market failure theory,³⁴ nor the distant, down-stream possible outcome of incentive theory.³⁵ L. Ray Patterson was correct, at core, copyright is a law of users rights.³⁶

This democratic reading of the Progress Clause bears little resemblance to current case law. Even when the Supreme Court issues pro-public domain decisions, the Court seems motivated by a desire to protect competition, not the cultural autonomy of the general public.³⁷ The Court's fundamental misunderstanding is typified by its brush-off of the First Amendment argument made by petitioners in *Eldred v. Ashcroft*, the recent failed attack on the Sono Bono

³² John Witherspoon, James Madison's mentor, taught that "the public" has certain rights over every person in society. Society may demand that each person be useful, and has "a right to the discovery of useful inventions, provided an adequate price be paid to the discoverer." John Witherspoon, *Lectures on Moral Philosophy*, in *The Selected Writings of John Witherspoon* 152, 228 (Thomas Miller ed. 1990). Garry Wills interprets similarly the following language in Hutchinson (whom Wills finds central to the Declaration of Independence). See Garry Wills, *Inventing America: Jefferson's Declaration of Independence* 250-55 (1978):

A like right we may justly assert to mankind as a system, and to every society of men, even before civil government, to compel any person who has fallen upon any fortunate invention, of great necessity or use for the preservation of life or for a great increase of human happiness, to divulge it upon reasonable terms.

2 Francis Hutchinson, *A System of Moral Philosophy* 109 (1755).

As a man cannot hoard useful ideas, he cannot destroy his own property if it is still useful to the community. Francis Hutchinson, *A Short Introduction to Moral Philosophy* 246-47 (1747). This moral theory stands in obvious tension with trade secret doctrine, but I leave that to a different article. *But see* *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (finding no conflict between federal patent regime and state trade secret law).

³³ *But see* *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (holding retrospective extension constitutional).

³⁴ *But see* *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 929-31 (2d Cir. 1995) (holding that copying articles from professional journals was not fair use because a market system had been organized allowing payment for such copies). As for the idea/expression dichotomy and related merger doctrine, the Fifth Circuit needed to go en banc to save the most obvious of applications, the wording of enacted law. See *Veeck v. SBCCI*, 293 F.3d 791 (5th Cir. 2002) (en banc) (reversing panel affirmation of injunction preventing Internet posting of model building code as enacted).

³⁵ *But see* *Eldred*, 537 U.S. at 207 (stating Congress "rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.").

³⁶ See L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of User's Rights* (1991).

³⁷ See, e.g., *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 212 (2000) (refusing to accept a forced reading of the Lanham Act because "[c]onsumers should not be deprived of the benefits of competition . . . by a rule of law that facilitates plausible threats of suit...").

Copyright Term Extension Act. The majority's First Amendment was not concerned "when speakers assert the right to make other people's speeches."³⁸

The tie between dissemination and societal improvement mocks the current First Amendment empowerment of speakers over listeners and of creative speakers over mere repeaters. Many should be encouraged to repeat others' speech. How else can the populace learn about competing ideas and important facts? In the market place of ideas, as in the market place for soda, repetition-based recognition and wide distribution are important keys to market power.³⁹

II. Outcomes of Reading the Original Text

How would the United States' positive law have differed if the Supreme Court had reached the Progress Clause when its original meaning was still clear?⁴⁰

First, intellectual "property" may never have been born. Copyright and patent should have been viewed as claims for payment, not property rules.⁴¹

Since dissemination is core, non-use is mis-use. Patent infringement should not be enjoined if the patent holder is not practicing the invention, but rather wishes to suppress

³⁸ See *Eldred*, 537 U.S. at 221. This concept has recently become a focus of academic consideration. See, e.g., Zimmerman, *supra* note 1; see also e.g., Randall Bezanson, *Speaking Though Others' Voices*, 38 Wake Forest L. Rev. 983, 1110 (2003) (arguing that acts of speech selection should not receive First Amendment protection unless *inter alia* the message communicated is the selector's own message). See also Balkin, *supra* note 2, at 5 ("Even when people repeat what others have said, their reiteration often carries an alteration in meaning or context.").

³⁹ This claim requires much further expansion, but not in this article. It undermines, for example, the standard judicial noninterest in censorship by powerful private interests. CBS refused to sell Move-On time to air an anti-Bush commercial during broadcast of the Super Bowl. See "CBS Censors Ad," at <http://www.moveon.org/front/> (visited Feb. 12, 2004). CBS's refusal to air is presumably protected by CBS's First Amendment right "to decide for [itself] the ideas and beliefs deserving of expression . . ." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 641 (1994). Such legality clashes with the need for dissemination of multiple points of view in a representative polity. See also, e.g., William Safire, *The Five Sisters*, NY Times op. ed. (Feb. 16, 2004) (attacking media consolidation; "You don't have to be a populist to want to stop this rush by ever-fewer entities to dominate both the content and the conduit of what we see and hear and write and say."). However, government intervention to preserve balance in free speech seems to perversely empower the entity limited by the First Amendment. Additionally, scholarship needs a better account of the relationship between free speech theory and artistic materials. See, e.g., Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1, 37-49 (2002) (positing a "freedom of imagination" within the First Amendment). Rubenfeld's theory, however, seems to protect only those who do their own imagining.

⁴⁰ Of course, this analysis assumes that Congress would have followed the spirit of the Clause or that the Court aggressively would have policed the Clause's bounds. But see *Eldred*, 537 U.S. at 212 ("We have stressed . . . that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."). The *Eldred* Court never defined the term 'progress.'

⁴¹ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972) (providing classic explanation of difference between property rules and liability rules). I say "claims for payment," rather than the more standard "liability rule," because I agree with David Lange in disputing the tone of condemnation. See David Lange, *Reimagining the Public Domain*, 66 (1&2) L. & Contemp. Probs. 463, 470 n. 22 (2003).

improved technology to enhance its own market position. A circuit split on this issue reached the Supreme Court in 1908 in a case involving an improved machine for manufacturing paper bags.⁴² The Court refused defendant's argument that the equitable remedy was damages, not an injunction. The Court's refusal was supported solely by the "property" nature of patents.⁴³

Copyright non-use is more problematical. The decision of when to release a work to the public is somewhat related to personality issues.⁴⁴ However, not all works embody the copyright holder's personality in any meaningful sense. Perhaps the proper copyright rule would bar injunctions on the equitable ground of non-use if, but only if, the work being suppressed is not personal to the suppressing copyright holder; injunctions could issue despite non-use if the allegedly infringed work was an autobiography,⁴⁵ but not a circus poster,⁴⁶ a lamp base,⁴⁷ or the packaging of a tooth-whitening product.⁴⁸ But what of works which are personal to multiple persons?⁴⁹ Hegelian objectification of the personal will in objects is possible only when the

⁴² See *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405 (1908).

⁴³ See *id.* at 424 ("It is his absolute property."); *id.* at 425 ("[I]n the three last cited cases it was decided that patents are property, and entitled to the same rights and sanctions as other property."); *id.* at 429 ("[I]t is the privilege of any owner of property to use it or not use it, without question of motive.").

⁴⁴ See, e.g., *Harper & Row Publ. v. Nation Enterp.*, 471 U.S. 539, 564 (1985) (holding that the unpublished nature of a work is "critical element" of fair use analysis, because of "the author's right to control the first public appearance of his expression.").

⁴⁵ See, e.g., *Harper*, 471 U.S. at 542 (former President Gerald Ford's personal memoirs).

⁴⁶ See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (circus poster).

⁴⁷ See, e.g., *Mazer v. Stein*, 347 U.S. 201 (1954) (lamp base).

⁴⁸ See, e.g., *Am. Direct Marketing v. Azad Int'l*, 783 F. Supp. 84, 97 (E.D.N.Y. 1992) ("[C]onclud[ing] that the proper remedy for infringement of the copyright in the images on a package [of a tooth whitening system] which has withstood a trade dress claim between the same parties [for lack of secondary meaning] is most likely a fee based on the shown value of the image.").

⁴⁹ As David Nimmer said of the secretive official group of scholars studying the Dead Sea Scrolls, "The committee, with its obsessive secrecy and cloak and dagger scholarship, long ago exhausted its credibility with scholars and laymen alike. The two Cincinnatians [who published a facsimile of the ancient text without permission] seem to know what the scroll committee forgot: that the scrolls and what they say about the common roots of Christianity and Rabbinic Judaism belong to civilization, not to a few sequestered professors." David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 *Houston L. Rev.* 1, 64 (2001). But see *Eisenman v. Qimron*, C.A. 2790\93, 54(3) P.D. 817 (Israeli Supreme Court affirming judgement of copyright infringement against those responsible for facsimile publication on the basis of Israeli law) (as discussed Nimmer, *supra*, at 72 (explaining that case lacks an official English translation)). Despite the Israeli court's ruling for the cartel, the illicit publication was instrumental in gaining wider scholarly access to the material, thus resulting in a new "efflorescence" of related work, see Nimmer, *supra*, at 76. I agree with Nimmer that copyright should not have existed under United States law, though perhaps not with each detail of his analysis. See Nimmer, *supra* at 81.

specific property/object is not already the reification of another's will.⁵⁰ Whatever the philosophical correctness of that position, it does not mesh with human-lived reality.⁵¹ One obvious example, many persons have deep personal bonds to religious texts.⁵² Furthermore, what of works disseminated for the purpose of exposing their fallacies?⁵³ Even the current, impoverished law of fair use is kindest to criticism.⁵⁴

Second, down-stream uses must be protected from up-stream blockage. The anti-circumvention provisions of the Digital Millennium Rights Act stand the Progress Clause on its head.⁵⁵ Pursuant to the dissemination reading, fair use should expansively limit not only copyright but patent and all other "intellectual property."⁵⁶ Similarly, if the Progress Clause is fully realized, derivative work rights would be enforceable only by payment of reasonable royalties.⁵⁷ A derivative work which does not earn a profit for its (re)creator would be

⁵⁰ See, e.g. Justin Hughes, *The Philosophy of Intellectual Property*, 77 Georgetown L.J. 287, 334 (1988) (claiming that according to Hegel "the will can only occupy a res nullius – either a virgin object or something that has been abandoned.").

⁵¹ See, e.g., Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 18 Cardozo AELJ 81, 82 (1998) (providing a more complex notion of possible personal ties to intellectual property *res* including creativity, intentionality, and identification as source).

⁵² Religious materials have been central in many intellectual property disputes under many different theories. See, e.g., Walter A. Effross, *Owning Enlightenment: Proprietary Spirituality in the "New Age" Marketplace*, 51 Buff. L. Rev. 483 (2003) (presenting detailed account of several major sets of cases); Nimmer, *supra* note 49 (presenting detailed account of intellectual property disputes over recreations and translations of ancient religious texts unearthed in Israeli desert). But see Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 Cal. L. Rev. 323, 391 (2003) (arguing for greater court sensitivity to Free Exercise Clause values in copyright disputes, including granting damages as opposed to injunctions, i.e. using "a liability instead of . . . the more common property rule regime.").

⁵³ See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Com. Svcs.*, 923 F. Supp 1231, 1239, 1248 n.19, 1249 (N.D. Cal. 1995) (issuing preliminarily injunction against former member of Church of Scientology who posted Church writings on the Internet for the purpose of demonstrating their fallacies).

⁵⁴ See 17 U.S.C. § 107 (allowing "the fair use of a copyrighted work . . . for purposes such as criticism, comment . . ."). But see *Religious Tech.*, 923 F. Supp. at 1249 ("Although criticism is a favored use, where that 'criticism' consists of copying large portions . . . with often no more than one line of criticism, the fair use defense is inappropriate.").

⁵⁵ See 17 U.S.C. § 1201.

⁵⁶ David Lange and Jennifer Anderson voiced such a vision at the Duke Fair Use Conference of November 2001, but then withheld their work-in-progress from publication pending further thought. I look forward to their insightful explication. See Lange, *supra* note 41, at 479-82.

⁵⁷ Historically, fair use was created by Justice Story in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), simultaneously with gifting authors with a right to block derivative works. See, e.g., L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. IPL 431 (1998); John Tehranian, *Et Tu, Fair Use? The Triumph of Natural Law Copyright*, working paper available at http://papers.ssrn.com/sol13/papers.cfm?abstract_id=486283 (visited Feb. 18, 2004). Absent the extension of authors' power, fair use would have been unnecessary. The challenged down stream works would not have been infringing.

unencumbered. The original meaning of the Progress Clause disallows copyright holders' current ability to stifle derivative works.⁵⁸ In many circumstances, the second author might equitably be required to pay some royalty to the previous author. Neither transaction costs nor unilaterally set fees, however, should be allowed to block dissemination of new works. Unlike David Lange, however, my sympathy is not centered on later creators,⁵⁹ my central concern is the public, even those members of the public who are the most passive content consumers.⁶⁰ The original Progress Clause protects every hum-drum person's ability to choose among the things of imagination, bond with some, and then share the bond with others. The public domain is the tool-kit of the highly creative, but it is also the shared imaginative realm of the entire public.⁶¹ Society is a network, sharing creates value. Professor Balkin makes the identical point from First Amendment theory:

Freedom of speech is thus both individual and cultural. It is the ability to participate in an ongoing system of culture creation through the various methods and technologies of expression that exist at any particular point in time. Freedom of speech is valuable because it protects important aspects of our ability to participate in the system of culture creation. . . .⁶²

. . . .

. . . The Internet teaches us that the free speech principle is about, and always has been about, the promotion and development of a democratic culture.⁶³

. . . .

. . . A democratic culture is a participatory culture.⁶⁴

⁵⁸ See 17 U.S.C. 106 ("Subject to sections 107 through 121, the owner of copyright under this title has the exclusive right to do and to authorize any of the following . . . (2) to prepare derivative works.')

⁵⁹ See Lange, *supra* note 41, at 465.

⁶⁰ As Internet public projects have demonstrated, the public is not composed of merely passive consumers. Working together in a network, furthermore, the relatively non-creative can make substantial contributions to the dissemination of culture. See generally Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 112 Yale L.J. 369 (2002) (explaining how Internet allows successful completion of large, complex projects by networking multiple small inputs).

⁶¹ See, e.g., Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 67 Notre Dame L. Rev. 657 (1990) (discussing cultural use of marks); Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 Columbia-VLA Journal of Law and the Arts Winter 123 (1996) (same); Malla Pollack, *Your Image is My Image*, 14 Cardozo L. Rev. 1391, 1391-1448 (1993)(same).

⁶² See Balkin, *supra* note 2, at 6.

⁶³ See *id.* at 44.

Like copyright, the patent statute would be drastically changed by the dissemination reading. Under current law, a patent is a right to exclude others, not a right to practice one's own invention. One's invention may be an improvement. To practice an improvement, one needs permission from the holders of any patents covering underlying inventions. Patent, furthermore, has neither a fair use exception⁶⁵ nor an independent creation defense. Even the judicially created experimental use exception from infringement may be defunct in practice.⁶⁶ As with copyright, if we take seriously the dissemination goal of the Progress Clause, and its underlying theory that everyone should be encouraged to build on existing knowledge, patent holders should not be allowed to block derivative works, a.k.a. improvement patents. Certainly research should be encouraged.⁶⁷

As for trademark and related doctrines, the dissemination meaning of the Progress Clause should limit infringement to those cases where the mark is viewed by the public at the time of alleged-infringement as the mark-holder's indicia of origin. Without such "secondary meaning," confusion is impossible.⁶⁸ Only provable likelihood of confusion justifies giving copyright-like protection without copyright limitations. Why? Because, while marks are not required to be

⁶⁴ See *id.* at 45.

⁶⁵ See Maureen A. O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 Colum. L. Rev. 1177, 1179-80 (2000) (arguing that patent statutes should be modified due to growing likelihood that patent holders will refuse to license technology for socially efficient uses).

⁶⁶ See *Madey v. Duke Univ.*, 307 F.3d 1351, 1361-63 (Fed. Cir. 2002) (holding that exception did not include use of invention in a non-profit university laboratory researching free electron lasers with no immediate commercial application). While the Federal Circuit purported not to deligitimize the experimental use defense, *see id.* at 1360, it limited the exception to investigations pursued "solely for amusement, to satisfy idle curiosity, or for strictly philosophical inquiry," *id.* at 1363. A research university's research was held not to be "idle curiosity," but rather "furtherance of the alleged infringer's legitimate business" objectives of "educating and enlightening students and faculty," "inceas[ing] the status of the institution," and perhaps "lur[ing] lucrative research grants, students and faculty." *Id.* at 1362.

⁶⁷ The concern for patent-holders' blockade power against further research is not mere idle speculation. Ability to block research was one core motive behind agribusiness' push for utility patents to be available on sexually reproducing plants. See *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 129 n. 1(2001) (allowing utility patents as well as Plant Variety Protection Act certificates on sexually reproducing plants, including basic food crops such as corn, while acknowledging that the most notable difference between utility patent and PVPA protection is that "the PVPA provides exemptions for research and for farmers to save seed from their crops for replanting."). For detailed discussion of the seed wars and their importance see the forthcoming publication of papers in the *Journal of Environmental Law & Litigation* from "Malthus, Mendel, and Monsanto: Intellectual Property and the Law and Politics of the Global Food Supply," Univ. of Oregon, April 9, 2004.

⁶⁸ See, e.g., *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 210 (2000) ("without distinctiveness [a mark] would not cause confusion . . . as the [statute] requires.") (internal quotation marks & citation omitted); *Qualitex Co. v. Jacobson Prods.*, 514 U.S. 159, 164 (1995) ("It is the source-distinguishing ability of a mark . . . that permits it to serve [a mark's] basic purposes.").

copyrightable subject matter,⁶⁹ they commonly either are copyrightable subject matter or are similar *res* failing the minimal originality standard required for copyright protection (such as individual words and short phrases).⁷⁰ This means the end of dilution doctrine⁷¹ and the end of the non-rebuttable presumption that incontestably registered marks are not merely descriptive.⁷² Similarly, “trade-dress,” mark rights in product configurations, must be limited to prohibit temporally unlimited patents (especially for *res* below the inventive level of inventions). At the expiration of a patent, all would-be-competitors would be allowed to market the identical product marketed under the patent privilege, provided they attach an accurate label.⁷³ Even some possibility of confusion should not be allowed to extend the constitutionally limited patent term.

Third, since constitutionally legitimate protection for “writings” and “discoveries” differ in scope, the line between patent and copyright must be maintained.⁷⁴ This constitutional distinction underlies the fights over software protection. Software is a machine built of text.⁷⁵ Was copyright in software an error? How far does software copyright protection protect? Should software be patentable instead of copyrightable? Both? Neither?⁷⁶

Fourth, courts should always make presumptions and decide doubtful cases against would-be excluders. This would end, for example, the almost universal rule that a *prima facie*

⁶⁹ See *The Trademark Cases*, 100 U.S. (18 Otto) 82, 94 (1879) (holding that trademark statute is not within Progress Clause power of Congress because most marks are neither copyrightable works nor patentable inventions).

⁷⁰ See *Feist Publ'ns v. Rural Tel. Svc.*, 499 U.S. 340, 359 (1991) (holding that “writing” of an “author” requires only a “minimal level of creativity.”).

⁷¹ 15 U.S.C. § 1125(c) provides “remedies for dilution of famous marks.” “The term ‘dilution’ means the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of . . . (2) likelihood of confusion, mistake, or deception.” 15 U.S.C. § 1127. See Brief of Malla Pollack, *Amicus Curiae* Supporting Petitioners, *Mosely v. V Secret Catalogue, Inc.*, 123 S.Ct. 1115 (2003), available at 2002 WL 1404641 (raising First Amendment and Progress Clause concerns with dilution doctrine).

⁷² See *Park N’ Fly Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 199-202 (holding that Lanham Act creates irrebuttable presumption that incontestably registered marks have secondary meaning, even if marks are descriptive).

⁷³ See *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 122 (1938) (holding that at expiration of a patent the public acquires “the right to make the article as it was made during the patent period,” “the right to apply thereto the name by which it had become known,” and “the good will of the article.”). *But see* *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 121 S. Ct. 1255, 1263 (2001) (refusing to reach constitutional issue).

⁷⁴ See *Baker v. Seldon*, 101 U.S. 99, 102 (1879) (“To give the author of the book an exclusive property in the art described therein, when no examination of novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright.”).

⁷⁵ See Pamela Samuelson, Randall Davis, Mitchell D. Kapur, & J.H. Reichman, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 Colum. L. Rev. 2308, 2316 (1994) (“[P]rograms are, in fact, machines (entities that bring about useful results, i.e., behavior) that have been constructed in the medium of text (source and object code).”).

⁷⁶ See, e.g., Dennis Karjala, *Distinguishing Patent and Copyright Subject Matter*, 35 Conn. L. Rev. 439 (2003) (discussing issue).

showing of copyright infringement triggers an assumption of irreparable harm, and, hence, a preliminary injunction.⁷⁷

Fifth, as discussed above, congressional expansions of the term of existing copyrights or patents would be void attempts to take constitutionally-protected rights from the general public.

Sixth, someone who wishes to enforce his or her copyright in a work should be required to place a conspicuous notice on every dissemination of the work. Absent such advance notice, a copyright holder should be eligible for, at the very most, money damages limited to a royalty compatible with the defendant's profits (if any). Perhaps worse than term expansion, worse than rights expansion, joining the Berne Convention has harmed the public's ability to use commercially non-viable copyrightable materials by optionalizing the C in the circle.⁷⁸ The dissemination core of the Progress Clause deplors the chilling effect of multiple, unknown, possible holders of copyright power.⁷⁹ Similarly, in patent, the requirement of notice would end the doctrine of infringement by equivalents.⁸⁰

In sum, *reading* the Progress Clause as originally written would revolutionize American "intellectual property" and, to some degree, First Amendment doctrine by prioritizing people's access to writings and discoveries – everyday non-intellectual, non-investing, people – the posterity for whose general welfare and liberty the Constitution was ratified.⁸¹ This is precisely the lesson Professor Balkin learns about free speech principles from the Internet.

Concluding Reality Check

"We cannot get out! We cannot get out!"⁸² Not true. Berne,⁸³ TRIPS,⁸⁴ domestic statutes,⁸⁵ case law, and solicitude for prior investments⁸⁶ block full implementation of the

⁷⁷ See, e.g., *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 677 (9th Cir.) ("When a plaintiff is likely to succeed on the merits of a copyright infringement claim, irreparable harm is presumed," affirming grant of preliminary injunction.); *Video Pipeline, Inc. v. Buena Vista Home Enter.*, 342 F.3d 191, 206 (3rd Cir.) (same), *cert. denied* (Feb. 23, 2004; U.S. No. 03-763); *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96 (2d Cir. 2002) (same). Cf. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *Duke L.J.* 147 (1998) (attacking ready availability of injunctions in intellectual property cases on First Amendment grounds).

⁷⁸ See 17 U.S.C. § 401(a) (making notice optional). During discussion, Jessica Litman made this point forcefully at the Duke Public Domain Conference, November 2001.

⁷⁹ See, e.g., *Eldred v. Ashcroft*, Brief of Amici Curiae the American Assn. of Law Libraries, *et. al.*, at 17-28 (arguing burden of looking for copyright holders in order to obtain permissions), *available at* 2002 WL 1059710.

⁸⁰ *But see Warner-Jenkinson Co., v. Hilton Davis Chem.*, 520 U.S. 17, 29 (1997) (refusing to limit patent infringement to literal form even though "[t]here can be no denying that the doctrine of equivalents, when applied broadly, conflicts with the definitional and public-notice functions of the statutory claiming requirement.").

⁸¹ See U.S. Const. Preamble ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

⁸² J. R. R. Tolkien, *The Lord of the Rings, Part I, The Fellowship of the Ring, Chapter 5, "The Bridge of Khazad-Dûm,"* at 419 (Ballantine Books pbk. 1965 printing) (warning from final records of the dwarf kingdom of Moria).

Drafters' vision. However, we can choose to turn in the right direction at each future fork in the road.⁸⁷ Many are coming.

⁸³ See, e.g., Berne Convention for the Protection of Literary and Artistic Works Art. 5(2) (Paris Text 1971) (“The enjoyment and the exercise of these [copy]rights shall not be subject to any formality . . .”).

⁸⁴ See, e.g., Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods of the General Agreement on Tariffs and Trade § 1, Art. 9(1) (April 15, 1994) (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) . . .”).

⁸⁵ See, e.g., 35 U.S.C. § 261 (“Subject to the provisions of this title, patents shall have the attributes of personal property.”); *id.* at § 271(d) (“No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (4) refused to license or use any rights to the patent.”).

⁸⁶ See, e.g., *Warner-Jenkinson*, 520 U.S. at 41 (“I address in particular the application of the presumption in this case and others in which patent prosecution has already been completed. The new presumption, if applied woodenly, might in some instances unfairly discount the expectations of a patentee who had no notice at the time of patent prosecution that such a presumption would apply.”) (Ginsberg, J., concurring).

⁸⁷ For example, we can decline to enact the currently pending “Database and Collections of Information Misappropriation Act” (H.R. 3261), and the also pending “Author, Consumer, and Computer Owner Protection and Security Act of 2003” (H.R. 2752).